JD–43–03
Providence, RI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PROVIDENCE JOURNAL COMPANY

and Case 1-CA-39430

PROVIDENCE NEWSPAPER GUILD,
TNG-CWA, LOCAL 31041, AFL-CIO

Elizabeth A. Vorro and *Joseph F. Griffin, Esqs.,*
for the General Counsel.
Richard A. Perras and *Lincoln D. Almond, Esqs.,*
(Edwards & Angell, LLP), of Providence,
Rhode Island, for Respondent.
E. David Wagner, Esq. (Angoff, Goldman,
Manning, Wanger & Hynes, P.C.), of
Boston, Massachusetts, for the Union.

DECISION

Statement of the Case

William G. Kocol, Administrative Law Judge. This case was tried in Providence, Rhode Island, on October 21-23, 2002. The charges were timely filed by the Providence Newspaper Guild, TNG-CWA, AFL-CIO (the Union), and the second order consolidating cases, amended complaint and further notice of hearing (the complaint), was issued July 30, 2002. The complaint, as amended at the hearing, alleges that the Providence Journal Company (Respondent), violated Section 8(a)(1) by threatening an employee with loss of career opportunities because of an employee's union activities, violated Section 8(a)(3) and (4) by changing the work assignment and hours of employment of employee Karen Ziner, violated Section 8(a)(3) and (5) by changing the job duties of copy editors in the features department resulting in the loss of "small grid" payments, and violated Section 8(a)(5) by involuntarily transferring employees from one bargaining unit into another bargaining unit, changing its procedures relating to postings jobs and filling open positions, changing its procedure relating to layoffs and reductions-in-force, changing its procedure relating to medical leave resulting in the termination of employee Michael Monti, changing the small grid payment in the features department with respect to editorial assistants, changing it practice with respect to the issuance of credit cards, refusing to provide the Union with certain information, making a regressive bargaining proposal, refusing to bargain over the effects of the implementation of a "buy out" program, refusing to meet with the Union regarding a revised bargain proposal that was regressive in nature and that conditioned agreement on the withdrawal of all unfair labor practice charges, and dealing directly with employees. Respondent filed a timely answer that denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Union, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, publishes the Providence Journal at its facilities in Providence, Rhode Island, where it annually derives gross revenues in excess of $200,000 and holds membership in or subscribes to interstate news services, publishes nationally syndicated features , and advertises nationally sold products. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent publishes a daily newspaper, the Providence Journal. Its main facility is located in Providence, Rhode Island, but it has bureaus in other locations in Rhode Island and Massachusetts. The Union represents about 450 employees in two separate collective-bargaining units. The news bargaining unit consists of employees working the news and editorial departments while employees in the janitorial, advertising, and systems department are part of the advertising bargaining unit. This case is closely related to another case I heard. That case, reported at JD-96-02, provides much background to understanding this case. The parties have been involved in many disputes concerning efforts to negotiate collective-bargaining agreements to succeed those that expired by their terms on December 31, 1999.

B. The Unfair Labor Practices

Threat of Loss of Career Opportunities

The General Counsel alleges that Respondent violated Section 8(a)(1) by threatening an employee with loss of career opportunities because of an employee's union activities. Babette Augustin has worked for Respondent since 1993 as a picture editor. On April 14, 2002, Brown University and Respondent were co-sponsoring a public affairs forum. The Union intended to pass out handbills at the event to inform the public of its labor dispute with Respondent; Augustin was the person who was to do the handbilling. Earlier while at work Augustin was introduced to a new intern, Kishan Putta. Later, Augustin again encountered Putta unexpectedly at an art gallery. Augustin said she could not stay long at the art gallery because she was going to Brown University to do the handbilling. Putta expressed interest and then went with Augustin. The next day Augustin encountered Carol Young, Respondent's deputy executive editor who is also in charge of the intern program. Augustin mentioned that she had met Putta and Young asked where they had met. Augustin said they met at the art gallery and then had gone to the university to do the leafleting. Young became agitated and said "Thank you for telling him what a terrible place the Journal is to work." Augustin answered that she had not said that to Putta and that she told Putta about the Union because he had asked. At the end of the conversation Young raised her voice and said "Thanks for ruining his career." Young admitted that this encounter occurred and that she became angry when she was told that Putta was taken to the handbilling event. Young testified that she told Augustin "How could you ruin somebody's first job, the excitement of starting a job, you know."

Analysis

I find it unnecessary to resolve the differences in testimony between Augustin and Young. The General Counsel contends that Young's comment to Augustin amounted to an unlawful threat. I do not agree. Even according to Augustin's version, in context it is clear that Young was not threatening that Respondent would engage in conduct that would ruin Putta's career because they had leafleted. Rather, Young voiced her view that Augustin had ruined Putta's career by Augustin's conduct. Young's comment cannot reasonably be understood to be a threat by Respondent to engage in unlawful conduct. The General Counsel cites *Outboard Marine Corp.,* 307 NLRB 1333, 1335 (1992), but in that case, unlike here, it was clear that the employer was threatening to take action against employees. Under these circumstances I shall dismiss this allegation in the complaint.[1]

Small Grid and the Copy Editors

The expired contracts provided that when employees performed the work of a more highly paid classification of employee for at least one-half of the employee's shift that employee was entitled to receive a higher rate of pay for that time. The parties refer to this as receiving "small grid" payments. The General Counsel alleges that Respondent violated Section 8(a)(5) and (3) by unilaterally eliminating the payment of small grid to copy editors in the features department. The events surrounding this allegation arose after an arbitrator issued a decision that concluded that Respondent breached the contract by failing to pay copy editors the small grid payments for the makeup work that they performed. Respondent complied with the award by making the payments to the affected employees. One of those employees is Ellen Sawyer, who has worked as copy editor in the features department for Respondent for over 7 years. Among other things, Respondent assigned Sawyer to perform makeup work. This is the process of placing text and pictures on the pages of the newspaper. Respondent assigned Sawyer to perform makeup work virtually every day that she worked. Because she spent more that one-half of her shift performing this work, she received small-grid payments for that time because the position of makeup copy editor was more highly paid than the position of copy editor. The job description for desk editor (which is another name for copy editor), in the news department includes, among other things, the work of "designing/paginating pages"; that is another way of describing makeup work. Phil Kukielski, a managing editor in the features department, testified that the job description applied to both the copy editor and the makeup copy editor. On March 27, 2002, Kukielski met with Sawyer and the three other copy editors in the features department. He told them that they no longer would be performing makeup work. Sawyer commented that this was being done because Respondent no longer wanted to make the small grid payments. Another employee said that it was really too bad because they were some of the best makeup employees in the features department. Kukielski said that he could not afford to have their makeup skills languish so they would be asked to perform makeup functions when the makeup editors were sick or on vacation. Under those circumstances, Kukielski explained, they would receive small grid payments. Since April 1, 2002, Sawyer and the other employees no longer were assigned makeup work as part of their daily assignments. However, they have substituted for makeup editors and received small grid payments for that work. On April 1, the Union advised Respondent that it had been informed that Respondent was planning to modify the duties of the grievants so as to prevent them from qualifying for small grid payments; the Union demanded bargaining on the subject. On April 5 Respondent

[1] I note that the General Counsel has not alleged or argued that Young's remarks were an unlawful disparagement of the Union.

replied, asserting that the job duties of the grievants had not been modified and that there had been no change in wages, hours, benefits, or working conditions that created a duty to bargain. Kukielski testified duties of copy editor and makeup copy editor were the same despite the difference in pay.

The management rights clause in the expired contracts provide in part that Respondent retained the right "to determine in the bargaining unit how, when, where and by whom work is to be performed." Upon the expiration of the contract Respondent continued its practice of deciding what work it would assign to individual employees, including copy editors.

Analysis

The General Counsel, citing *NLRB v. Katz,* 369 U.S. 736 (1962), argues that the assignment of makeup duties away from copy editors amounted to a unlawful unilateral change in terms and conditions of employment. I agree. Respondent had for years assigned makeup tasks to the copy editors. This became a condition of their employment. The record is clear that Respondent stopped assigning makeup work to the copy editors resulting in a loss of pay to those employees; it did so without first notifying the Union and giving it an opportunity to bargain. Respondent relies on the management rights language in the expired contract to argue that it had the right to make the changes without bargaining with the Union. However, in *Ironton Publications,* 321 NLRB 1048 (1996) and *Blue Circle Cement Co.,* 319 NLRB 954 (1995) the Board made clear that waivers contained in management rights language do not survive the expiration of the contract. I conclude that by unilaterally failing to continue to regularly assign makeup tasks to copy editors in the features department, Respondent violated Section 8(a)(5) and (1).

As noted, the General Counsel argues that Respondent's conduct also violated Section 8(a)(3). He argues that the decision not to assign the work to copy editors anymore was in response to the arbitration award and:

> First, Respondent paid the back pay award as directed by the arbitrator. Then, having done so, it changed the copy editors job duties so that they would no longer qualify for the small grid. Such an end run of the arbitration award evidence retaliatory motive.

I disagree. There is no direct evidence that Respondent harbored any animus towards the copy editors because of the arbitration award. The mere fact that Respondent's action followed the arbitration award is insufficient to permit me to make any inference in that regard. Under these circumstances I shall dismiss this allegation of the complaint.

Small Grid and the Editorial Assistants

The General Counsel alleges that Respondent violated Section 8(a)(5) by changing the small grid payment in the features department with respect to editorial assistants. By way of background in understanding the dispute underlying this allegation, the Union contended that employee Cecilia Arnold was being paid as an editorial assistant when in fact she was performing some of the work of a departmental assistant, a higher paid classification, and was therefore entitled to small grid payments. The job description for the position of departmental assistant provides:

> The Departmental Assistant may perform any editorial assistant work and, in addition, reports directly to and supports the efforts of the head of the work. The departmental assistant's tasks include, but are not limited to, those of an editorial assistant.

Notwithstanding this job description, in the features department the practice developed where Respondent paid certain employees as departmental assistants even though they performed only the work of an editorial assistant.

Arnold has worked for Respondent since 1987, and worked as an editorial assistant in the news department until April 2001. As an editorial assistant in that department Arnold worked with press releases, prepared listings, and dealt with the public. In April 2001, Arnold was transferred to the features department where she continued to work as an editorial assistant. There Arnold prepared the Sunday listings for the lifestyle section of the newspaper. This was a calendar of events that was happening during the weekend. Employee Janet Butler, a departmental assistant who performed only the work of an editorial assistant, was transferred out of the features department and Respondent distributed her work to other employees in the department. Arnold was assigned to prepare certain lists that Butler had prepared. Steven Smith also worked as a departmental assistant. He too prepared various listings. Smith testified without contradiction that there is no difference in the job duties between departmental assistant and editorial assistant in the features department. Beginning in about November 2001, Respondent assigned some of his listing duties to Arnold. Those duties included preparing general interest and real estate listings. Arnold spent more that half a day doing this work, but Respondent refused to pay her the small grid payments.

On February 6, 2002, the Union filed a grievance claiming that Respondent transferred a departmental assistant from the features department and assigned those duties to Arnold yet failed to pay Arnold the higher rate. A grievance meeting was held on May 29, 2002, at which time Respondent took the position that the former departmental assistant had been performing work of an editorial assistant and that work had been assigned to Arnold. Respondent contended that Arnold was simply performing more of the same work that she had always performed. The Union contended that the work had traditionally been done by the departmental assistant and that Respondent was attempting to downgrade the work by assigning it to Arnold. Respondent answered that Arnold continued to do what she had always done – type lists. On June 26, 2002, Respondent denied the grievance.

Analysis

The General Counsel argues that Respondent violated the Act by failing to make the small grid payments to Arnold when she was assigned some of the duties formerly performed by departmental assistants. The General Counsel concedes in his brief:

> [I]t is undisputed that in the features department, the editorial assistant and three of the departmental assistants perform similar work.

Indeed, the job description for the departmental assistant confirms the fact that the departmental assistant performed the duties of editorial assistant as well as other duties. Here the General Counsel has failed to establish that the additional duties assigned to Arnold were in any significant way different from the duties of an editorial assistant. Put differently, the General Counsel has failed to show that the duties assigned to Arnold were those duties that

differentiated a departmental assistant from an editorial assistant. Rather, it is clear that the additional duties assigned to Arnold were those of an editorial assistant. I therefore cannot conclude that Respondent implemented a change in working conditions by failing to pay Arnold the small grid. I dismiss this allegation of the complaint.

Transfer of Employees

The General Counsel alleges that Respondent violated Section 8(a)(5) by unilaterally transferring two employees from the news bargaining unit to the advertising bargaining unit. The Union contends that the expired collective-bargaining agreements provided that transfers between units could only occur with the consent of the transferred employees. Actually, the expired contracts provide "An employee shall not be required to substitute in a position outside the bargaining unit without his or her consent." On August 27, 2001, Respondent transferred employee William Murphy to the position of photographer in the news unit. Murphy had been a promotion photographer in the advertising unit. Employee Jocelyn Van Stolk worked in the advertising unit as a promotion specialist. In late June 2001, she was transferred to the news unit as a picture editor. Respondent takes the position that Van Stolk was on medical leave so this transfer was never consummated. Records show that Van Stolk was promoted and transferred on May 21, 2001, but went on disability beginning June 8, 2001. Respondent also contends that Murphy's transfer was a promotion with higher pay and he never objected so that he implicitly volunteered. As a result of the transfers both employees lost potential bumping rights in the event of a layoff because seniority is based on time employed in the unit. The Union filed a grievance over the transfers.

The evidence shows that in December 1992, Respondent posted an opening for the position of porter in the production unit. An employee from the news unit was transferred into the production unit to fill that vacancy. On four occasions during 1999, Respondent posted an opening for an online designer position. During that year two employees were transferred to occupy that position. In August 2002, Respondent posted for an opening for the position of library assistant in the news unit; the position was filled by an employee from the advertising unit.

Analysis

In order to show a violation here the General Counsel must establish at a minimum that the transfers occurred without the employees' consent. Murphy and Van Stolk did not testify at the trial. There is no direct evidence that the transfers occurred without their consent. The General Counsel argues that I should infer that the transfers were involuntary because Respondent failed to post the vacancies for those positions. But it does not necessarily follow from that fact that the transfers were involuntary; the employees may have consented to the transfer notwithstanding the absence of a posting. That especially may be the case here where both transfers involved promotions. Moreover, the expired contract does not prohibit nonconsensual inter-unit transfers; it only forbids nonconsensual inter-unit substitutions and the General Counsel has not established that those terms are identical. The General Counsel and the Union argue that a practice had developed whereby Respondent conceded that it could not involuntarily transfer employees. They rely on the evidence, set forth above, that there were a few occasions that Respondent posted for the positions and filled them through voluntary transfers. However, these instances are too few in number to establish that Respondent could not make involuntary inter-unit transfers; they merely show that on those occasions Respondent decided to rely on voluntary transfers. The General Counsel has failed to establish a practice

forbidding nonconsensual inter-unit transfers.[2] I shall dismiss this allegation of the complaint.

Transfers and Reductions-in-Force

In a related allegation the General Counsel alleges that Respondent violated Section 8(a)(5) by transferring Murphy and Van Stolk without adhering to the procedures set forth in the expired contract concerning layoffs and reductions-in-force. The evidence shows the number of full-time equivalents in the promotions department, where Murphy and Van Stolk had worked before they were transferred, dropped from 17.48 to 9.88 during the relevant period. The expired collective-bargaining agreements provided that seniority would prevail in all cases of layoff resulting from a staff reduction for economic reasons.

Analysis

The General Counsel argues that because Murphy and Van Stolk were not the least senior employees Respondent violated existing procedures concerning reductions in force. This argument fails for several reasons. First, while there is evidence of a general decline in business due to economic reasons, the General Counsel has failed to establish that the reduction in force that occurred in the Promotions Department resulted from economic reasons, a contractual prerequisite. Finally, and more importantly, Murphy and Van Stolk were not laid off; they were transferred. There is no evidence that Respondent had a policy of transferring employees by seniority or that Respondent transferred these employees to avoid laying them off. For these reasons I shall dismiss this allegation of the complaint.[3]

Transfers Without Posting Notice of Vacancies

In still another related allegation, the General Counsel next alleges that Respondent violated Section 8(a)(5) by transferring Murphy and Van Stolk without first posting the positions in the manner set forth in the expired contracts. The expired contracts provide:

> Present employees will be given first and due consideration for vacancies in higher classifications. Notice of all such vacancies shall be posted, with a copy to the Guild, eight (8) days in advance of filling the vacancy.

Respondent did not post the vacancies into which Murphy and Van Stolk were transferred.

Analysis

The General Counsel argues that the failure to post for the two positions amounted to an unlawful unilateral change. I disagree. There is no evidence that Respondent repudiated its

[2] The Union argues in its brief that Respondent shared the Union's interpretation that the expired contract forbad involuntary inter-unit transfers. In support of this conclusion the Union points to the testimony of Timothy Schick, the Union's administrator, that he was not aware of any such involuntary transfers. This testimony is insufficient to justify the conclusion that Respondent agreed with the Union's interpretation of the contract, and I reject that conclusion.

[3] The General Counsel argues in his brief that Respondent violated the Act by refusing to bargain with the Union over its intention to downsize the promotions department and the effects of the downsizing. However, that theory is not set forth in the complaint and I shall not consider it.

practice of posting generally. The evidence shows only that on two occasions Respondent failed to adhere to the general practice. Isolated breaches of existing practices are insufficient to show a unilateral repudiation of that practice, and the fact that there no longer is a grievance-arbitration procedure to deal with such breaches does not alter this conclusion. The Board does not act as an arbitrator upon the expiration of collective-bargaining agreements containing grievance-arbitration procedure. The Union cites *Western Summit Flexible Packaging,* 310 NLRB 45, 53 (1991). However, in that case it apparently was not clear whether the employer otherwise continued to adhere to the postings requirements of the expired contract. I shall therefore dismiss this allegation of the complaint.

Medical Leave

The General Counsel contends that Respondent violated Section 8(a)(5) by changing its procedure relating to medical leave in the advertising bargaining unit resulting in the termination of employee Michael Monti. In a related allegation, the General Counsel alleges that Respondent also violated Section 8(a)(5) by refusing to provide the Union with information concerning the details of any case since 1995 where Respondent had required a bargaining unit employee to return to work over the objections of his or her physician. In November 1999, employee Michael Monti went on medical leave and sought disability benefits; he also filed for worker's compensation. Both claims were denied. In August 2001, he requested to return to work. Respondent reviewed his file and denied his request. On August 28, 2001, Respondent sent Monti the following letter:

> This letter is in response to your telephone request to return to work on or about August 27, 2001.
> Your request to return to work is denied.
> As you know, in November of 1999, you left your job, claiming "stress." Your claim of "stress" has been rejected both for workers' compensation and by our medical disability insurance carrier. You submitted no medical certification entitling you to a medical leave of absence.
> Under the Workers' Compensation Act, an employee's right to reinstatement expires one year after the last day of work for an employer. Your last day of work was November 1, 1999, and your right to reinstatement expired one year later, on November 2, 2000.
> Your rights to employment ended on November 2, 2000.

Attached to the letter was a human resources letter indicating that Monti had been fired on November 2, 2000 for "failure to return to work."

On September 10, 2001, the Union filed a grievance contending that Respondent violated the contract by refusing to allow Monti to return to work from his leave of absence. article 15, section 5 of the collective-bargaining agreement provides, in pertinent part

> Employees with five (5) or more years of service may be granted a medical leave of absence with additional extensions, if necessary, of up to twenty-four (24) months."

The parties stipulated that from 1998 to August 2001, no unit employees were involuntarily terminated while on medical leave whose duration was less than the contractually-permissible duration.

On September 14, 2001, Schick requested that Respondent:

> Please provide me with the details of any case where the company has required a Guild-represented employee to return to work over the objections of his/her personal physician … since 1995.

The parties met on September 18, 2001. Respondent took the position that when Monti asked to return to work Respondent examined his situation and concluded that he had filed a bogus claim and it had the right to stop "milking of the system." Concerning the request for information, Respondent turned over some documents concerning another employee and explained that it had no other documents responsive to the request. On September 19, Respondent denied the Monti grievance.

Analysis

The General Counsel argues that Monti's termination amounted to a unilateral change of the medical leave provisions. I disagree. Monti was terminated because Respondent believed he had abused the system by filing false claims. The merits of the position are not at issue in this proceeding; this is not an arbitration proceeding. In order to prevail under these circumstances the General Counsel would have to establish that Respondent had the practice of not firing employees on medical leave even though it felt it had good cause to do so. The General Counsel has presented no such evidence. I shall dismiss this allegation of the complaint.

Concerning the request for information, under Section 8(a)(5) an employer must furnish a union with requested information that is potentially relevant and necessary to allow the union to perform it duties as the bargaining representative of the employees. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967). The evidence shows that Respondent provided the Union with the information that it possessed and told the Union that it had no other documents responsive to the request. Because the General Counsel has not established that there was more information that should have be provided to the Union, no more is required from Respondent. I shall dismiss this allegation of the complaint.

Credit Cards

The General Counsel contends that Respondent violated Section 8(a)(5) by changing its practice with respect to the issuance of credit cards. By way of background, in August 1999, the Union filed a grievance claiming that Respondent changed its longstanding practice of providing a credit card for use by employees who expect to incur major expenses while performing their work. The specific instance mentioned in the written grievance involved reporter Karen Ziner, who had been assigned to cover President Clinton's visit to Martha's Vineyard. On October 6, 1999, the Union sent Respondent a letter confirming certain representations made by Respondent concerning credit card use. That letter contained the following:

> While the intent of the credit card is for company purposes, if an employee accidentally charges a personal expense on the card this will not be a problem, since the company will only reimburse the expenses submitted, not on the actual bill.

Based on the explanations and representations made by Respondent and described in the letter, the Union withdrew the grievance. Respondent never corrected any portion of the Union's letter and thereafter Respondent considered the grievance withdrawn. On January 4, 2002, Respondent advised the Union that it was considering revising its credit card use policy by having employees sign a new cardholder acknowledgement form. The new form contained eight points, two of which concerned the Union. Point three provided "I understand that the corporate card is designated for business purposes only." Point six stated "I agree that amounts may be deducted from my paycheck for past due funds owed to…" the credit card company. Respondent indicated a willingness to discuss the matter with the Union. The Union, on January 9, 2002, rejected the offer to discuss the matter separately but instead took the position that issue should be discussed as part of the ongoing negotiations for a collective-bargaining agreement. The Union demanded that no changes be made in the credit card policy. The credit card policy had not been a part of the ongoing negotiations. On January 14, 2002, Respondent expressed its disappointment that the Union was unwilling to discuss the matter outside the context of the contract negotiations. Respondent described this position as unreasonable and announced that it was going to implement the new credit card policy. The Union then filed a grievance over the implementation of the new policy and Respondent denied the grievance. During the extended period of negotiations the Union and Respondent agreed on a number of occasions to bargain over matters separately from the collective-bargaining negotiations. Generally, if Respondent's proposals were viewed as favorable from the Union's point of view the Union did not object to separate bargaining and implementation.

Analysis

As I indicated in my earlier decision, an employer is generally not free to implement a portion of its bargaining proposals during contract negotiation absent the existence of overall bargaining impasse. *Pleasantview Nursing Home,* 335 NLRB 77 (2000). But here the issue of credit cards was not among the proposals that any party had made during bargaining. The changes suggested by Respondent were also not reasonably related to any bargaining proposal. The Union points to Article XIX, Sections 1 and 2. They provide:

> The Publisher shall pay all legitimate expenses incurred by the employees in the performance of their duties, provided such expenses are authorized or later approved by the Publisher.
> and
> Necessary working equipment authorized by the Publisher shall be provided to employees and paid for by the Publisher

But neither of these sections of the collective-bargaining agreement pertains to the changes suggested by Respondent; Respondent continued to pay employees for their expenses. Furthermore, the evidence shows that in the past the parties had dealt with the issue of credit cards outside of the process of bargaining for a contract.

The Board has not extended the *Pleasantview* rationale to allow a union to prevent an employer from making any changes in working conditions, even those changes not directly related to the negotiations of a collective-bargaining agreement, until an overall bargaining impasse is reached. Under these circumstances I find *Pleasantview* to be inapplicable. Because the Union was not entitled to delay bargaining on the credit card changes, its refusal to accept Respondent's offer to bargain within a reasonable period of time allowed Respondent to implement the changes. I shall dismiss this allegation of the complaint.

Regressive Wage Proposal

The General Counsel alleges that Respondent violated Section 8(a)(5) by making a regressive wage proposal in order to avoid reaching agreement or lawful impasse. The parties met only twice for purposes of contract negotiations in 2001. At the February 14th meeting the wage proposal on the table provided for no wage increase in 2000, and three percent increases in 2001 and 2002. In the earlier proceeding I ruled that Respondent's withdrawal of the wage increase proposal for 2000 violated the Act because it was done to punish employees for engaging in protected, concerted activity. After the events of September 11th, Respondent froze all of the wages of its employees, including those employees covered by other collective-bargaining agreements. Also, as more fully described below Respondent implemented an early retirement buy out program. On October 1, 2001, the Union invited Respondent to return to the bargaining table. On October 10, 2001, Respondent sent the Union a letter that included the following:

> Unfortunately, during this time economic circumstances have changed negatively. The economy has deteriorated which has affected our advertising business. Accordingly, our offer for a wage increase effectively [sic] January 1, 2002 is withdrawn.

In fact, Respondent suffered a significant decline in revenues in 2001 as compared to earlier years. By October 2002, Respondent ended the wage freeze. Respondent did not put the wage increase back on the bargaining table and the Union never requested that Respondent do so.

Analysis

The General Counsel concedes that regressive bargaining proposals are not necessarily unlawful. He argues, nonetheless, that in the earlier decision I had concluded that Respondent had unlawfully withdrawn a proposal for a wage increase beginning in 2000. But there the withdrawal of the wage increase proposal was designed to punish employees for their protected, concerted activities. In this case there is no such evidence. Moreover, the events of September 11th and a downward turn in revenues intervened and served to disconnect Respondent's conduct from the earlier unlawful action. The General Counsel also argues that Respondent's withdrawal of the wage proposal was unlawful because it occurred in the context of unremedied unfair labor practices. He argues "Respondent's bad faith so pervaded the bargaining relationship that it is difficult to separate one unlawful action from another." The General Counsel cites *Daily News of Los Angeles,* 315 NLRB 1239, 1243 (1994), enfd. 73 F.3d 406 (D.C. Cir 1996). However, in that case the Board had found a violation based on *NLRB v. Katz,* supra. It did not premise its conclusion on whether or not that employer had committed other unfair labor practices. I conclude that Respondent's withdrawal of the wage increase proposal was not unlawful regressive bargaining, but it was instead a reaction to the events after September 11 th and declining revenues. Finally, the General Counsel argues that Respondent's failure to place the wage proposal back on the table after it lifted the wage freeze evidences bad faith. But the Union never requested that the proposal be placed back and Respondent was under no obligation to do so voluntarily. Nor was the refusal to restore the wage proposal specifically alleged as a violation in the complaint. I shall dismiss this allegation of the complaint.

Buy Out Program

The General Counsel alleges that Respondent violated Section 8(a)(5) by refusing to

bargain over the effects the implementation of a "buy out" program. On October 3, 2001, Respondent notified the Union that it was offering a voluntary early retirement offer to its employees. Respondent indicated that it would like to extend the same offer to the union represented employees. It signaled that time was of the essence and stated that if the Union did not agree to the proposal by October 12, 2001, the offer would be withdrawn. Respondent also offered to meet and discuss the matter with the Union. The parties met to discuss the matter for about 2 hours on October 10. The Union had done its own analysis of the number of positions eligible under the proposed buy out as well as the age of the individual holding that position. After discussion and after Respondent agreed to certain minor modifications and clarifications of the offer the Union accepted it. The Union had a full opportunity to raise matters at the meeting. The next day the Union confirmed in writing its acceptance of the buy out proposal. The letter also indicated that the agreement made by the parties the day before concerned matters such as the effect of the buy out on advertising incentives, base pay, and pending litigation. On October 19, 2001, after the buy out program was implemented, the Union requested to bargain concerning the effects of the program. On October 24, 2001, Respondent told the Union that the buy out program had been discussed earlier in advance of its implementation. Respondent assured the Union that it would continue to follow existing terms, conditions, and practices. Respondent ended by inviting the Union to let it know if there was any specific effects that it wanted to discuss. The Union replied the next day. It claimed that the earlier meeting did not include any bargaining over effects. The Union indicated that it wanted to bargain over the following list of items.

> --How work will be allocated to bargaining unit employees;
> --What changes in assignments, workload, and schedules are necessary;
> --How the Company intends to comply with the various terms, conditions, and practices;
> --What positions will be filled, and in what manner and what positions will remain vacant.

Respondent did not reply to this letter. Schick explained that the Union had not requested to bargain over the effects earlier because it took Respondent's proposal as a take-it or leave-it offer and it was fearful that if it raised other issues Respondent might withdraw the offer if the issues were not resolved by the deadline. He also claimed that until the Union learned about who actually took advantage of the buy out the Union was unable to ascertain what the effects would be. He testified that he was surprised when approximately 52 of the 90 eligible unit employees took advantage of the buy out.

Analysis

The General Counsel argues that the Union did not waive its right to bargain over the effects of the buy out program because the Union viewed Respondent's offer as a take-it or leave-it proposition and that the Union was surprised by the number of employees who availed themselves of the buy out offer. I disagree. The Union had a full opportunity to raise any matter that it desired during the October 10 meeting. Indeed, as described above, several effects of the buy out were discussed and agreed to. It was incumbent upon the Union to test whether Respondent's proposal was made in bad faith and it chose not to do so. Respondent was entitled to know the entire package of Union demands at the time it agreed to extend the buy out offer to bargaining unit employees. The Union may not extract only certain concessions, obtain the benefits of the buy out program, and then seek to extract other concessions after it has pocketed the benefits. The fact that the Union was surprised by the number of persons who took advantage of the buy out offer does not change this situation. The Union was fully aware

of the persons covered by the buy out offer and had done its own assessment of those individuals. It had the opportunity to raise all matters of concern to it with Respondent. Importantly, Respondent assured the Union that it would continue to apply existing procedures flowing from the expired collective-bargaining agreements in dealing with remaining aspects of the buy out offer. There is no contention that Respondent has done otherwise. In effect, therefore, Respondent has already informed the Union of the answers to the questions that the Union asked in its October 25 letter. Under these circumstances I shall dismiss this allegation of the complaint.

Discussion of Settlement

The General Counsel alleges that Respondent violated Section 8(a)(5) by making a regressive bargaining proposal, refusing to meet with the Union regarding a revised bargaining proposal that was regressive in nature and that conditioned agreement on the withdrawal of all unfair labor practice charges, and dealing directly with employees. While preparing for the impending trial in the earlier case, on February 20, 2002, Respondent sent the Union a "settlement offer to wipe the slate clean and return to normal labor relations." Respondent made the offer "[p]rovided that the Guild withdraws and fully settles all pending grievances, lawsuits, NLRB charges and other litigation." That same day Respondent sent the unit employees a copy of the settlement offer with the following letter.

> Enclosed is a copy of the proposal made today by the Company to your Guild representatives.
> As you may know, 3 weeks ago we signed a new 5 year contract with the Teamsters, and last year we reached an 8 year agreement with the Pressmen.
> The enclosed is an effort to reach a new contract with the Guild through 2005. Our offer is a proposal to have an amicable relationship with the Guild as we have with both the Teamsters' and Pressmen's unions.
> You have every right to speak directly to your Guild representatives and be heard on this proposal.

The Union responded to the offer that same day. It stated that the proposal was a positive first step and offered to ask the NLRB to postpone the impending trial for a short period of time and to bargain around the clock on February 25 and 26, in an effort to resolve all outstanding issues. The next day the Union notified Respondent that the Guild offices would be closed from noon Friday, February 22 until 8 a.m. Monday, February 25. On February 22, Respondent sent a letter indicating its surprise by the Union's rejection of the offer and lamenting another lost opportunity. Respondent said its offer was very fair and simple and all that was required was a yes or no. It complained that what it received was a "rejection wrapped in process." Respondent again invited the Union to accept the proposal and then meet immediately with a mediator to work out the remaining details.

Analysis

The General Counsel first argues that the February 20 offer was unlawful because it was regressive. However, as pointed out above, there is nothing inherently unlawful about regressive bargaining proposals. Here, months had elapsed since the last bargaining session and Respondent was free to act upon any economic power it felt it had gained over that time period. Moreover, the Union itself did not react negatively to Respondent's initial proposal. Respondent's offer was clearly an effort to achieve, and not avoid reaching, a collective-

bargaining agreement. I shall dismiss this allegation of the complaint.

Next, the General Counsel argues that Respondent refused to meet with the Union concerning the February 20 proposal and that Respondent took a take-it or leave-it approach. In fact, Respondent did reject the Union's request to postpone the trial and bargain around the clock. But Respondent was not required to agree to a postponement of the trial and thereby relieve the pressure that it might put on the parties to settle the case quickly. Although Respondent was certainly firm that it was offering a "package" to resolve all outstanding matters, under the circumstances of this case, where the parties had been involved in bargaining for months without success and where the trial was imminent, Respondent's bargaining stance concerning its February 20 proposal was not unlawful. This allegation will also be dismissed.

Next, the General Counsel alleges that Respondent unlawfully conditioned the acceptance of its proposal on the withdrawal of the pending unfair labor practices. I disagree. Respondent's February 20 offer was not simply an offer to reach a contract; it was also a settlement offer to dispose of the pending unfair labor practice charges. The Board encourages the parties to attempt to resolve issues covered by charges and complaints. It is difficult to conceive how matters can be settled by the parties in a nonBoard fashion without conditioning the settlement on the withdrawal of the underlying charges. The General Counsel cites *Patrick & Co.,* 248 NLRB 390, 394 (1980). However, in that case the employer conditioned the resumption of bargaining upon the withdrawal of unfair labor practice charges. Here, when the Union rejected Respondent's settlement offer the parties simply reverted back to the bargaining positions that had existed prior to the offer. This allegation too is dismissed.

Finally, the General Counsel alleges Respondent engaged in unlawful direct dealing with employees by simultaneously sending the February 20 offer directly to employees. I agree. The facts show that Respondent distributed the settlement offer to bargaining unit employees before the Union had a reasonable chance to discuss the offer with Respondent. Respondent's action in this regard has the tendency to undermine the Union in its role as the exclusive collective-bargaining representative of the employees. *American Pine Lodge Nursing and Rehab. Center,* 325 NLRB 98, 103 (1997). By bypassing the Union and dealing directly with employees with respect to working conditions, Respondent violated Section 8(a)(5) and (1).

Other Refusals to Provide Information

The General Counsel alleges that Respondent violated Section 8(a)(5) by refusing to provide the Union with certain information requested on June 5, 2001. By way of background, on April 4, 2001, the Union requested a long list of payroll and other information for all unit employees. On April 12, 2001, Respondent supplied the Union with information that it claimed satisfied the Union's request. On April 16, 2001, the Union wrote to Respondent claiming that it was not provided a list of employees receiving location differentials and weekly amounts of those differentials, information for eight employees listed as being on short-term disability, information for six employees with individual contracts, and information for three-named individuals. On April 18, 2001, Respondent provided the Union with additional information. On May 2, 2001, the Union wrote to Respondent that it had noticed that certain hire dates on the information provided were different from the dates indicated on information previously provided by Respondent. On May 7, 2001, Respondent explained that the employees had breaks in service and that was the reason for the different hire dates. Respondent also acknowledged that there was an error in the information provided to the Union, attributed the error to a conversion in computer soft ware from WSA to People Soft, corrected the error, and gave the Union a copy of the corrected information. This response prompted a whole new series of

questions by the Union in a letter dated June 5, 2001. The Union asked:

> Does the People Soft payroll system maintain "most recent date of hire", as was previously provided to the Guild under the old payroll system? If not, why? If so, please provide this information for each bargaining unit employee.
> What is "original date of hire" used for? Are there benefits or other employment conditions that are calculated using this date?

Schick testified that the Union needed the information to ensure that it had correct and accurate dates of hire for seniority purposes.

The letter also indicated:

> In reviewing other information provided April 12, I have found inconsistencies in how merit pay is reported. In some cases the amount shown as weekly and hourly rates are exclusive of merit pay. In the following cases, the amount appears to be inclusive of merit pay.

The letter then listed the names of four employees. Schick conceded that Respondent has supplied all the information necessary for the Union to ascertain both the weekly and hourly pay as well as merit pay, but he testified that the Union needed to ascertain whether the information was accurate and that:

> we weren't missing something in applying an interpretation of the data but rather that we could look at it in one spot and know by looking at one column that when it said rate of pay that it either included or excluded (merit pay) rather than having to look at three documents and make a judgment call."

The letter continued:

> In the case of Kathleen Burdick, she appears to be paid $9.50 a week below the wage scale for her classification.
> In addition there appear[s] to be numerous cases where the reported pay scale does not correspond to the reported job title. For example, on the first page of the information provided April 12: Charles Allen and Susan Brandley.

Schick testified that the Union wanted to ascertain whether the employees were being paid properly.

The letter indicated:

> There are also numerous cases where the reported experience step does not correspond to the proper level.

The letter then gave the names of four employees as examples. Experience steps correspond to pay increases employees get based upon the number of years they have worked for Respondent. Employees eligible for experience step increases are not eligible for merit pay. Schick testified that the Union was troubled by the information provided by Respondent because

it listed some employees as being at the starting experience step while their pay rates indicated that they were at a higher experience step.

The letter continued:

> Brian Beaulieu is reported as being in wage grade 7 as a copy editor, which is below the wage grade of 6, as a makeup copy editor he was reported being in information previously provided. Beaulieu's wage rate is consistent with that of grade 6. Further, he is not reported as having any merit pay, which is also consistent with a grade 6 classification.

Schick testified that the Union wanted to ascertain what Beaulieu's correct wage grade and title were and find out why there was a variance from previously provided information. He also explained that there had been issues relating to the rates of pay for copy editors and makeup copy editors and the Union wanted to determine if Beaulieu's pay rate was related to that matter.

The letter ended:

> Having found these discrepancies on the first page of the information provided on April 12, I am holding off on a more detailed review until I have a better understanding of the source of the discrepancies.

Respondent never replied to the letter.

Analysis

The information requested by the Union was clearly relevant to its need to function effectively as the representative of the employees. Respondent offers no explanation as to why it failed to respond to the Union's request. By failing to furnish the Union the information requested in the June 5, 2001 letter, Respondent violated Section 8(a)(5).

Turning to another allegation concerning a refusal to provide information, at some point Respondent notified several employees that in a recent audit of its 401(k) plan it noticed that its contribution to the employee's account was incorrect. Respondent advised the employees that it was in the process of correcting the matter and indicated the exact amount of money that Respondent owed to the employee's account. On September 10, 2001, the Union made an information request. The Union advised Respondent that the Union had learned that Respondent had told some unit employees that 401(k) payments had not been made in some instances. The Union wrote:

> Please provide the Guild with an explanation of the nature of the problem, its duration, and how it has been corrected.
> Please provide the Guild with a copy of any communications made to employees related to this problem.
> Please provide the Guild with a list of affected bargaining unit employees and the amount of money involved.

Schick testified that the Union needed the information despite Respondent's assurance that it was correcting the matter because there had been problems with 401(k) payments in the past

and the Union wanted to know if there were any similarities to the previous problems, it needed to know what had happened so it could advise employees on the matter, and to determine if there were issues that had to be addressed by the Unites States Department of Labor. Respondent never replied to the letter. Thomas McDonough, Respondent's human resources director, explained that after he looked into the matter he concluded that the problem had been resolved.

Analysis

The Union was entitled to a response to its letter of September 10, 2001. The fact that Respondent felt the problem was solved is not significant; the Union was entitled to decide that matter for itself. *General Electric Co.,* 290 NLRB 1138, 1146-1147 (1988). By refusing to provide the Union with the information requested in the September 10, 2001 letter Respondent violated Section 8(a)(5).

Turning to the next allegation, on February 6, 2002, the Union made another information request. That day it filed a grievance contending that Respondent unilaterally began prorating 401(k) contributions for part-time employees in 1997 and had fraudulently concealed this from the Union since then. The Union requested:

> To assist the Guild in reviewing this matter, please provide the Guild with:
> 1. The names of all part-time employees who have been employed in the Guild bargaining unit since 1997,
> 2. The number of weeks each of the above participated in the 401(k) plan as a part-time employee.
> 3. The number of days each of the above worked as a part-time employee, and
> 4. The amount of the 401(k) contributions made by the Company to each of the employee's accounts while a part-time employee.

Respondent replied on February 11, 2001. It asserted that the grievance and the information request were made in bad faith. Respondent said that the Union had known since at least 1997 of the prorating of the contributions. It attached a booklet distributed to all employees that explained the prorating process. That booklet contained the following statement:

> Participants who are scheduled to work less than 37 ½ hours per week, will receive a contribution reduced in pro-ration to the hours the Participant is scheduled to work.

Other information provided to employees clearly indicates that employees were informed of the prorating of contributions. Schick, however, testified that he had never seen the booklet before February 11, 2001. That same day the Union sent Respondent a copy of a letter it had received in January 1998, from Respondent that enclosed the plan document for the Respondent's retirement plan. The letter advised the Union that the only amendment to the plan document since January 1996 pertained to irregular extra employees. Respondent did not otherwise respond to the Union's request for information.

Analysis

The Union would generally be entitled to information of the type of information requested in its February 6, 2002 letter. *Grand Rapids Press,* 331 NLRB 320 (2000). However, the Union

knew, or certainly should have known, that Respondent had been prorating the contributions for years. The Union premised the relevance of the request on the fact that there had been fraudulent concealment of a fact it knew about or should have known about. Under these circumstances the general presumption of relevance has been negated and Respondent was not required to furnish the information. I will dismiss this allegation of the complaint.

Karen Ziner

Finally, the General Counsel alleges that Respondent violated Section 8(a)(3) and (4) by changing the work assignment and hours of employment of employee Karen Ziner. Ziner testified in the prior proceeding concerning a unilateral change in Respondent's taxi voucher system and its direct dealing with Ziner on that matter. I concluded that Respondent violated Section 8(a)(5) in both instances. Ziner has worked for Respondent since 1979. In about 1983 Ziner became a reporter. During her career Ziner covered many significant stories for Respondent. She also took a leave of absence for a year and traveled to the border camps in Thailand and spent time in the Cambodian refugee camps there. She traveled into Burma and reported on the short-lived democratic revolution there. When she returned she wrote many stories about the Cambodian community in Rhode Island. She also wrote stories about the Latino and Black communities in Rhode Island. She later covered major local crime stories. During her career as a reporter Ziner won numerous awards. For example, in 1986 Ziner won a UPI award for her reports about the mills of Woonsocket, in 1988 she won the Epilepsy Foundation of America National Journalism Award, in 1990 she won second place in the New England Associated Press Newspapers Association, and in 1992 she won the Overseas Press Club Award for a five-part series she wrote about the Cambodian border camps closing. In other words, Ziner was a highly regarded, award-winning journalist.

During the summer 2001, Ziner reported on a case of serious domestic violence. In late July 2002, after some complaints concerning whether Ziner had accurately reported certain details of the story, Respondent required Ziner to write a correction on the story and removed her from further coverage of the story. In August 2002, Ziner's coworkers circulated and signed a petition that protested Respondent's removal of Ziner from the story. The petition read:

> We are deeply troubled that you have taken the Threats domestic violence story away from a reporter, Karen Lee Ziner, based on the complaints by a woman who was the story's focus. The decision, we understand, was influenced by the company lawyer, Mark Ryan. The reporter was not involved in any discussions before her removal, and this action was taken despite the fact her reporting was beyond reproach.
>
> This sends a dangerous message to the public: subjects of stories can call The Providence Journal and intimidate management into removing reporters from a story, regardless of the story's validity. It also sends a disturbing message to the staff, whose members may now infer that if they engage in hard-hitting journalism, or even simply report the facts, they may be punished if their reporting angers someone who catches management's ear.
>
> Your punishment of Karen leaves us wondering whether the company will support us if we vigorously cover the news, and we vigorously protest this action.

A copy of the petition was given to Andy Rawson, Respondent's executive editor. News of Ziner's removal from the story spread and was reported in the *New York Times* on August 20,

2001. The *New York Times* story quoted Ziner, Rawson, and a portion of the petition.

During this time period Ziner worked Monday through Friday, 9 a.m. to 5 p.m. After the events of September 11th, a vacancy occurred on the night shift after the night shift reporter was assigned to cover events in Afghanistan, an area where he had some expertise. On October 5, 2001, Ziner was called to meet with Thomas Heslin, Respondent's metropolitan managing editor. About an hour earlier, Ziner had attended a going away party for employee Morgan McVicar; Respondent had assigned McVicar to work on the night shift but he quit rather than work in that position. Because Ziner was fearful that she might be the next person assigned the shift, she brought Brian Jones, a union representative, to accompany her. Ziner asked Heslin whether the meeting was about something bad and Heslin answered that it was not bad or good. Ziner asked whether Respondent was going to change her hours or assignments. Heslin said it was something like that but he was not expecting that Jones would be there. Ziner explained that she felt she needed union representation given the way things had been going over the last 6 weeks. The meeting ended when Heslin said that he would have to consult with someone before he could tell Ziner what was going on.

Heslin did not get back to Ziner; instead, on October 9, 2001, Respondent posted Ziner's schedule assigning her to work Tuesday through Saturday, 4 p.m. to midnight. While working that shift Ziner received the additional wage differential specified in the contract. On the night shift Ziner answered the city desk telephone where callers inquired about the weather or the lottery, made complaints, or gave reporting tips. An office assistant does this work during the day shift. Ziner watched the 6 p.m. news on the television to be sure the newspaper was not missing something of significance for the next day's paper. She takes a call for the Rhode Island lottery numbers and writes them down and gives them to the appropriate person. Ziner writes press announcements such as the announcement of deer mating season, promotions, and meetings. She also prepares special obituaries for well known members of the community. She covers ongoing stories when the day shift is short of staff or cannot cover particular events such as evening hearings before the state legislature and cultural events. She frequently calls the police and fire departments and the Coast Guard and listens to police and fire department scanners to see if anything important is happening. If there is something very significant, Ziner goes to the scene and covers the story. Typically these events involve fires and homicides. However, Ziner has also had calls from and about the mayor of Providence that resulted in stories. On that shift she also covered events such as when Eleanor Sneal, a leading feminist, visited Providence. Ziner's stories continued to appear on the front page of the newspaper. The topics of the stories concerned how a family fortune vanished, how an early Black entrepreneur continued to inspire the community, how a zoo sheltered tree kangaroos, about the Governor indicating that bonds would finance housing developments, how a group was targeting the cat population explosion, about a town administrator being charged with bribery, about the local Cambodian and Laotian communities celebrating the year of the horse, about the thoughts of students on the eve of graduation, about a antiabortion center being built near an abortion clinic, how a noxious giant hogweed had been cropping up in gardens, the departure of a public safety chief, the Mayor of Providence's effort to stay out of prison during the appeal of his conviction, a judge's ruling praised by immigrants, about firefighters stripping for charity, and how a local hospital was to double its emergency room space.

Historically, Respondent has assigned employees who worked in the outlying bureaus with limited experience to work on the night shift. Typically reporters were assigned to that shift for a year or so after which they were frequently moved to the day shift. In the 22 years that Ziner had work for Respondent no day shift reporter from the main office had ever been assigned to the night shift. Heslin testified that Respondent was short staffed in the bureaus

and that was the reason he selected from the staff at the main facility, but he later admitted the main facility was also understaffed. Heslin testified that he selected Ziner because "she had the skills and the background to do the kind of deadline reporting the job required." Although Ziner had already served over a year on the night shift at the time of the trial in this case, Respondent had no plans to assign her back to the day shift. Heslin testified that he was unaware of the Ziner petition prior to the time he assigned Ziner to the night shift. He also denied that the domestic violence incident played any role in his decision.

As mentioned above, Respondent initially offered the night shift position to McVicar. He had worked for Respondent since 1985; at the time Respondent assigned him to the night shift he was working as a reporter covering urban affairs and redevelopment. McVicar earned approximately six awards during his years with Respondent and Respondent twice nominated him for the Pulitzer Prize. In August 2001, McVicar wrote the petition, described above, concerning Ziner's removal from further reporting on the domestic violence story. He was the first to sign it. He then circulated the petition around the newsroom in Respondent's main facility as well as in its bureau offices. At some time in late September Heslin told McVicar that he had been assigned to the night beat. Heslin gave no reason for the transfer and McVicar testified that he was shocked and that the transfer "was coming out of the blue." Heslin testified that the reason he selected McVicar to work on the night shift was: "Well, it's an important position at the paper. From the pool of people that I had to select from, he had the background and the skills to do it well." Heslin testified that he was unaware that McVicar had actively supported the Ziner petition. Heslin testified that he was totally unaware of that petition. Heslin's office was in the newsroom, the location where McVicar circulated the petition.

Analysis

Respondent first argues that Ziner's assignment to the night shift was not a demotion of sorts. I reject that contention. Although Ziner did not suffer a reduction in salary, the hours and days of work were clearly inferior to the day shift. More significantly, the career opportunities for Ziner were dramatically diminished. Ziner went from reporting some of the top stories for Respondent to listening to police and fire department scanners and giving out information on the weather and lottery numbers. Respondent attempts to counter this by pointing to the stories that Ziner did while on the night shift that appeared on first page of the newspaper. However, those stories for the most part included topics such as tree kangaroos, stripping firefighters, and giant hogweed. These were hardly the equivalent of the award winning stories that Ziner had done in the past. Also, the assignment to the night shift was perceived to be such a demotion that McVicar decided to resign rather than accept the assignment. I conclude that Ziner's assignment to the night shift was akin to a demotion.

In determining whether Ziner's assignment to the night shift was unlawful, I apply the shifting burden analysis set forth in *Wright Line.*[4] The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

protected union activity.[7/] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8/] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9/]

[7/] *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400 (1983).

[8/] See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the Illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9/] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

The General Counsel argues that the assignment was motivated by the fact that Ziner had testified in the earlier unfair labor practice hearing, had engaged in union activity, and was the subject of protected concerted activities. I deal first with the last contention. I conclude that the circulation and signing of the petition on behalf of Ziner constituted protected concerted activity as defined in Section 7 and protected by Section 8(a)(1). In *Meyers Industries, Inc.,* 268 NLRB 493 (1984), the Board explained the meaning of protected concerted activity. Here, the petition circulated on behalf of Ziner was the result of the concerted activity of her co-workers and it dealt with a significant condition of employment – the circumstances under which they may be removed from covering a story. Respondent clearly knew the concerted nature of the activity by virtue of the fact that the petition was given to Rawson. Respondent counters by pointing to Heslin's testimony that he did not know about the petition. I find that testimony not credible. News of the petition made the *New York Times*. Indeed, Rawson, Heslin's superior, was quoted in the story. The *New York Times* article pertained Heslin's own department. Further, the petition was circulated in the newsroom where Heslin's office is located. Under these circumstances it defies belief that Heslin would not have noticed this story. Moreover, Heslin's general demeanor as a witness was not at all convincing. I conclude that Heslin was well aware of the petition and its content.

In assessing whether the General Counsel has established a violation, I recognize that there is no direct evidence of any animus exhibited by Respondent concerning the petition. However, the Board has long held that animus can be inferred from all the circumstances surrounding that matter. Here, the timing of the transfer supports the finding that it was motivated by Respondent's negative reaction to the petition and its attendant negative publicity. The story made the *New York Times* on August 20 and by early October Respondent had decided to transfer Ziner to the night shift when the opportunity presented itself after the events of September 11. Moreover, the nature of Respondent's conduct itself leads me to conclude that it was designed to punish Ziner. Yet no credible lawful reason exists to explain why Respondent took a veteran, award-winning reporter from the day shift and put her on the night

shift covering mostly mundane matters. Respondent does not contend that the assignment was related to any poor performance by Ziner. Heslin's testimony concerning why he selected Ziner is so vague and lacking in supporting foundation that I do not credit it, even apart from Heslin's general lack of credibility. The Board has long held that the absence of a lawful reason for engaging in conduct may warrant the inference of an unlawful reason. I make that inference in this case.

Respondent argues that the fact that if first tried to assign another employee to the night shift demonstrates that Ziner's assignment was not unlawfully motivated. To the contrary, I conclude that Respondent's attempt to first assign McVicar to the night shift actually serves to strengthen the case that Respondent's selection of persons to work on that shift was connected to the Ziner petition. As pointed out above, McVicar drafted and circulated the petition. His was the first signature on the petition. Respondent was at least aware of the fact that McVicar was the first to sign the petition. For reasons stated above, Heslin's testimony that he was unaware of McVicar's participation in the petition effort is simply not credible. His explanation as to why he selected McVicar suffers from the same flaws as his explanations concerning Ziner. Thus, we have a situation where Respondent had an opportunity to assign virtually anyone from its staff to the night shift but it selected first the leader of the petition drive and then the subject of the petition. I cannot conclude that this is a mere coincidence.

I conclude that the General Counsel has met his burden under *Wright Line* that protected concerted activities were a substantial motivating factor in Respondent's decision to assign Ziner to the night shift. I have already rejected Respondent's efforts to show that it would have made the assignment even in the absence of the protected concerted activity. I therefore conclude that by assigning Ziner to the night shift because she was the subject of protected concerted activities of employees on her behalf, Respondent violated Section 8(a)(1).

The General Counsel's alternate arguments are not as convincing. While Ziner did indeed testify during the prior trial, so did other witnesses and Ziner's testimony did not stand out from the other witness. Nor does the element of time support the inference that Ziner's assignment to the night shift was related to her providing testimony. I shall dismiss the allegation that Ziner's assignment violated Section 8(a)(4). The General Counsel's contention that Ziner's assignment was related to union activity is even weaker; I shall dismiss the allegation that it violated Section 8(a)(3).

Conclusions of Law

1. By unilaterally failing to continue to regularly assign makeup tasks to copy editors in the features department, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By bypassing the Union and dealing directly with employees with respect to working conditions, Respondent violated Section 8(a)(5) and (1).

3. By failing to furnish the Union the information requested in the June 5, 2001 letter, Respondent violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

4. By assigning Karen Ziner to the night shift because she was the subject of protected concerted activities of employees on her behalf, Respondent violated Section 8(a)(1).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have concluded that Respondent has unilaterally failed to continue to regularly assign makeup tasks to copy editors in the features department. I shall require Respondent to resume assigning makeup tasks to the copy editors in the features department in the same manner that it did before its unlawful conduct and make those employees whole for the losses they may have suffered as a result of the unlawful conduct as provided in *Ogle Protection Service,* 183 NLRB 682 (1970). I have concluded that Respondent unlawfully assigned Karen Ziner to work on the night shift. I will order Respondent to assign her back to the day shift working the days and hours that she had previously worked.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, the Providence Journal, Providence, Rhode Island, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Unilaterally failing to continue to regularly assign makeup tasks to copy editors in the features department.

(b) Failing to provide information that the Union has requested and that is relevant in allowing the Union to fulfill its duties as the collective bargaining of the employees.

(c) Discriminating against employees because they engage in or are the subject of protected concerted activities.

(d) Bypassing the Union and dealing directly with employees with respect to working conditions, Respondent violated Section 8(a)(5) and (1).

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Resume assigning makeup tasks to the copy editors in the features department in the same manner that it did before its unlawful conduct and make those employees whole in the manner described in the remedy section of this decision.

(b) Provide the Union with the information that it requested in the June 5 and September

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

10, 2001 letters.

(c) Within 14 days from the date of this Order, assign Karen Ziner back to the day shift working the days and hours that she had previously worked.

(d) Within 14 days after service by the Region, post at its facilities in and around Providence, Rhode Island, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 5, 2001 .

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 11, 2003

William G. Kocol
Administrative Law Judge

[6] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally fail to continue to regularly assign makeup tasks to copy editors in the features department.

WE WILL NOT fail to provide information that the Providence Newspaper Guild, TNG-CWA, AFL-CIO (the Union) has requested and that is relevant in allowing the Union to fulfill its duties as the collective bargaining of the employees.

WE WILL NOT discriminate against employees because they engage in or are the subject of protected concerted activities.

WE WILL NOT bypass the Union and deal directly with employees with respect to working conditions, Respondent violated Section 8(a)(5) and (1).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL resume assigning makeup tasks to the copy editors in the features department in the same manner that we did before our unlawful conduct and WE WILL make those employees whole in the manner described in the remedy section of this decision.

WE WILL provide information that the Union has requested and that is relevant in allowing the Union to fulfill its duties as the collective-bargaining representative of the employees.

WE WILL deal directly with the Union as the exclusive collective-bargaining representative of the employees in the recognized collective-bargaining units.

WE WILL within 14 days from the date of this Order, assign Karen Ziner back to the day shift working the days and hours that she had previously worked.

The Providence Journal
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

200 West Adams Street, Suite 800, Chicago, IL 60606-5208

(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.